

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
5:04CV99-03-MU

JAMES FRANKLIN MCCLELLAND,)
Plaintiff,)
v.)
OFFICER BUSH et. al.,)
Defendants.)

ORDER

THIS MATTER is before this Court on Defendants' Motion to Alter Or Amend the Judgment . . ." (Document Number 20) For the reasons stated in this Order, Plaintiff's motion is denied..

On July 29, 2004, Plaintiff filed a pro se Complaint pursuant to 42 U.S.C. §1983 alleging that on July 13, 2004 he was brutally assaulted by a fellow inmate at the Alexander Correctional Center; that such attack occurred despite the fact that Defendants knew or should have known that the inmate attacker was planning to assault the Plaintiff; and that such attack occurred in the presence of the Defendants who failed to take any action to prevent the attack or to stop it once it got underway. Plaintiff alleges that Defendants were deliberately indifferent to the risk of harm to which he was exposed, and to his right to be protected from violence.

On September 29, 2005, this Court issued an Order dismissing Plaintiff's case for failure to exhaust his administrative remedies. By the instant motion, Plaintiff seeks to alter the judgment in this case and amend his Complaint since he now claims that his administrative

remedies have been exhausted.

This Court's September 29, 2005 Order dismissed the case and this case is now closed. However, the Order specified that Plaintiff's case was to be dismissed without prejudice to the filing of a new complaint if and when Plaintiff's administrative remedies had been exhausted. Therefore, the Clerk is directed to open a new case and to file Plaintiff's New Complaint and his IFP Motion and Trust Account Statement in that new case number.

THEREFORE, IT IS HEREBY ORDERED that:

- 1) Plaintiff's Motion to Alter the Judgment is Denied.
- 2) The Clerk is directed to open a new case and file Plaintiff's New Complaint and IFP Motion in that case.

Signed: November 9, 2005



Graham C. Mullen
Chief United States District Judge

